

STATE OF MICHIGAN
COURT OF APPEALS

MAUREEN SALVETA,

Plaintiff-Appellant,

v

FLORENCE CEMENT COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED

May 24, 2012

No. 303067

Macomb Circuit Court

LC No. 2009-003930-NO

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in this negligence action. We reverse and remand for further proceedings.

Plaintiff was riding her bicycle along the sidewalk when the sidewalk abruptly ended, causing her to flip headfirst over the handlebars and suffer injuries. The sidewalk was in the process of excavation being conducted by defendant, pursuant to a contract with the Michigan Department of Transportation (MDOT). Plaintiff alleged that there were neither warnings that the sidewalk was under construction nor barricades erected at the time of her accident. This negligence lawsuit followed. At the close of discovery, defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that it owed no duty to plaintiff with regard to its work on the sidewalk. Relying on *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), defendant argued that any duty to repair the sidewalk and warn users of the construction emanated from its contract with MDOT; thus, plaintiff failed to allege that defendant owed her a duty that was separate and distinct from its contractual duties to MDOT and summary disposition was proper. The trial court agreed, holding the duty that plaintiff alleged was breached emanated solely from the contract and not a duty separate and distinct from the contract. Accordingly, defendant's motion for summary disposition was granted. This appeal followed.

Plaintiff argues that the trial court misapplied the holding in *Fultz*, 470 Mich at 460, which resulted in the erroneous dismissal of her case against defendant. After de novo review of the trial court's decision to grant defendant's motion for summary disposition, which was premised on the issue of duty, a question of law, we agree. See *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011); see, also, MCR 2.116(C)(10).

In a negligence action, the threshold issue is whether the defendant owed the plaintiff a duty to avoid negligent conduct. *Maiden v Rozwood*, 461 Mich 109, 131; 597 NW2d 817 (1999). A defendant's contractual obligations may give rise to a duty to a non-contracting third party. However, as our Supreme Court explained in *Loweke*:

[c]ourts have misconstrued *Fultz's* test requiring a separate and distinct duty by erroneously focusing on whether a defendant's conduct was separate and distinct from the obligations required by the contract or whether the hazard was a subject of or contemplated by the contract. This interpretation is incorrect because, in analyzing tort actions based on a contract and brought by a noncontracting third party, *Fultz* directed courts to focus on whether a particular defendant owes *any duty at all* to a particular plaintiff, and, thus, generally required an inquiry into whether, aside from the contract, a defendant is under *any* legal obligation to act for the benefit of the plaintiff. [*Loweke*, 489 Mich at 168 (emphasis in original, quotation marks and citations omitted).]

Determining whether a separate and distinct duty exists does not necessarily involve an analysis of the underlying contract. *Id.* at 169. The separate and distinct duty to support a tort claim can arise "by a number of preexisting tort principles," including the common-law duty to use due care in undertakings. *Id.* at 170. This common-law duty was explained in *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967), as imposing "on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Id.* at 261; see, also, *Loweke*, 489 Mich at 165. This common-law duty is not extinguished by the existence of a contract. *Id.* at 159, 170.

In this case, plaintiff alleged that defendant had a common-law duty to exercise reasonable care to avoid physical harm to persons in the performance of its work on the sidewalk, including keeping the area reasonably safe by warning users that the sidewalk was under excavation and erecting barriers or blockades on that portion of the sidewalk. This common-law duty was separate and distinct from defendant's contractual agreement with MDOT. The trial court, however, misconstrued the holding in *Fultz* by "focusing on whether a defendant's conduct was separate and distinct from the obligations required by the contract or whether the hazard was a subject of or contemplated by the contract," as discussed in *Loweke*, 489 Mich at 168. Accordingly, the trial court's conclusion that plaintiff failed to establish that defendant owed her a duty of care was erroneous and the order granting defendant's motion for summary disposition is reversed. In light of our resolution of this issue, we need not consider plaintiff's alternative claim that she was a third-party beneficiary of the construction contract.

Defendant argues on appeal that the dismissal of this action should be affirmed on the alternative ground that plaintiff was impaired at the time of her accident and, thus, this action was barred by MCL 600.2955a(1). This argument was raised in the trial court but not decided. Generally, an appellee is limited to the issues raised by the appellant unless a cross-appeal is filed. MCR 7.207; *Vanslebrouck v Halperin*, 277 Mich App 558, 565; 747 NW2d 311 (2008). However, an appellee can argue on appeal that affirmance is required on alternative grounds. *Id.*

Defendant argues that plaintiff's blood test taken at the hospital after the accident revealed cocaine and a blood alcohol level of .168; therefore, this action was barred by MCL

600.2955a(1) which provides an absolute defense to this personal injury action. However, MCL 600.2955a(1) may provide an absolute defense to plaintiff's action only if defendant establishes that plaintiff "had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury." MCL 600.2955a(1). Further, MCL 600.2955a(1) provides: "If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage." See, also, *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 456; 702 NW2d 671 (2005). Because, at minimum, a question of fact exists as to whether plaintiff was "50% or more the cause of the accident," summary disposition is not appropriate. See MCR 2.116(C)(10).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood